
Rationale for Classification as ‘Other’ Requester Category

TCLG submits this letter on behalf of its 501(c)(5) non-profit client that is the actual requester of the attached FOIA request. This letter constitutes a formal request for classification as “any” other requester under 5 U.S.C. § 522(a)(4)(A)(ii)(III).

FOIA Requester Categories

FOIA defines three distinct categories of requesters. 5 U.S.C. § 522(a)(4)(A)(ii). The three categories are commercial use requesters; non-commercial use by educational, scientific, or news media; and “any” other requester not described in the first two categories. 5 U.S.C. § 522(a)(4)(A)(ii)(I)-(III). Commercial use requester fees are limited to “reasonable standard fees” for search, duplication, and review. Non-commercial educational, scientific or news media requester fees are limited to “reasonable standard fees” for duplication. “Any” other requester fees are limited to “reasonable standard fees” for search and duplication. *Id.* Note that this *is not* a request for a fee waiver. Fee waiver analysis is completely separate from requester category determination.

FOIA Mandates a Use-based Not Identity-based Test for Requester Classification

FOIA mandates all federal agencies “shall conform” schedule of fees and requester status classifications to the guidelines and uniform schedule of fees promulgated by the Office of Management and Budget (“OMB”). 5 U.S.C. § 522(a)(4)(A)(i). OMB’s Uniform FOIA Fee Schedule expressly mandates a use-based and not identity-based examination of requester status classifications. “Because ‘use’ is the exclusive determining criterion, it is possible to envision a commercial enterprise making a request that is not for commercial use. . . . Moreover, because ‘use’ not identity controls, agencies will have to spend more time than they do now in determining what the requester intends to do with the records sought.” 52 Fed. Reg. 10013.

An agency cannot assume commercial use absent evidence showing commercial use in the record. *Harrington v. DOJ*, No. 06-0254, 2007 WL 625853, at *3 n.8 (D.D.C. Feb. 27, 2007). If the agency has “reasonable cause to doubt” about the use of the records or if the use is “not clear from the record itself” the agency “should seek additional clarification before assigning the request to a specific category.” 52 Fed. Reg. 10018.

OMB’s Uniform FOIA Fee Schedule defines commercial use as “a use or purpose that furthers commercial, trade, or profit interests.” 52 Fed. Reg. 10017-10018. Federal Courts have agreed with OMB’s plain meaning definition of commercial. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987). Use of requested records for defense

in private litigation is also not commercial use. *Muffoletto v. Sessions*, 760 F. Supp. 268, 278 (E.D.N.Y. 1991).

Here, TCLG's client is a non-profit entity that utilizes this information solely to uncover and report violations of federal labor law including the Davis-Bacon and Related Acts ("DBRA") to the U.S. Department of Labor ("DOL"). The DOL initiates an investigation based on the third-party complaint. DOL makes public and disseminates information about its investigations and findings via press releases, press conferences, meetings and seminars, brochures, and online. TCLG's clients have no input on the direction or outcome of DOL's investigations. Only DOL decides whether violators of DBRA will have to pay their employees back wages.

TCLG's client is acting as a watchdog, working for the sole benefit of unknown third parties who are workers on federally-funded projects, aiding the government in the elimination of fraud, waste, and abuse of taxpayer money. Acting for the sole benefit of unknown and unaffiliated third parties, or for the benefit of the government or taxpayers at large will have no impact on TCLG's client's cash flow or profits. The use of the records as a watchdog for the benefit of third parties is not commercial use. TCLG's client's use is not by educational, scientific or news media. The TCLG's client use falls squarely in the catch-all "any" other category. 5 U.S.C. § 522(a)(4)(A)(ii)(III).

FOIA Mandates Use-based Test for Actual Requester Not Requester's Representative

Requester status classification is determined by the actual requester, not by the requester's representative. *See* 52 Fed. Reg. 10013-14, 10017-18 "When any FOIA request is submitted by someone on behalf of another person" it is the underlying requester's intended use that determines the requester status classification. *See DOJ FOIA Guide "Fees and Fee Waivers"* at 9. Here, the actual requester is the 501(c)(5) non-profit entity seeking to utilize the information in a watchdog capacity for the sole benefit of unknown third parties and not for any personal commercial, trade or profit benefit.

Conclusion

For the above reasons, TCLG requests that your agency categorize the actual requester, a 501(c)(5) non-profit entity in the "any" other requester category under 5 U.S.C. § 522(a)(4)(A)(ii)(III) because the records are used for a non-commercial purpose as a watchdog to protect unknown third parties, the government and taxpayers from fraud, waste and abuse.